IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 140 of 1986

For Approval and Signature:

Hon'ble MR.JUSTICE D.P.BUCH
and
Hon'ble MR.JUSTICE H.H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

STATE OF GUJARAT

Versus

MOHMED HAMIDBHAI TEJBHAI

Appearance:

1. Criminal Appeal No. 140 of 1986

Mr B D Desai, APP for Petitioner No. 1

MR AD SHAH for Respondent No. 1-3

CORAM : MR.JUSTICE D.P.BUCH
and
MR.JUSTICE H.H.MEHTA

Date of decision: 04/04/2003

ORAL JUDGEMENT

(Per : MR.JUSTICE D.P.BUCH)

The State of Gujarat has preferred this Criminal Appeal under section 378 of the Code of Criminal Procedure, 1973 (for short, 'the Code') in order to challenge the judgment and acquittal order dated 8.10.1985 recorded by the learned Addl.Sessions Judge, Bharuch, in Sessions case No.41/85 under which the learned trial Judge acquitted the present respondents from offences punishable under sections 302, 324, 323, 325, 451 and 504 read with section 34 of IPC as well as for offence punishable under section 37(1) read with section 135 of the Bombay Police Act. The facts of the case of the prosecution before the trial court may be briefly stated as follows:

2. That the informant Kheranbibi Abbaskarim, Exh.27 is a resident of village Hansot in Bharuch district. According to her case, on 15.2.1985 at about 9 a.m. there was some quarrel between her sons and the daughters of respondent no.1. That thereafter, at about 8 p.m., she was sitting on her otta. That at that time, her father-deceased had come to see her and when the deceased father was on his way to her residence, respondent no.1 intercepted him with dharia in his hand. That respondent no.1 rushed towards the deceased and dealt dharia blow on his head. That on account of the said blow, the deceased fell down on the ground. That at that time, the prosecution witness Abdulkareem was with the deceased. That even other two witnesses - Gulamnabi Abbasbhai and Mohammed Hanif Abbas were also present in the house of the informant for enquiring about the quarrel which took place in the morning. That thereafter, Gulamnabi rushed towards the father. That at that time, the second respondent dealt a spear blow on the brother which caused injury to the brother on his left forearm. That respondent no.3 had dealt stick blows on the father at a place of his body where dharia blow had already been struck. That the brother of Mohammed Hanif tried to intervene and, therefore, the third respondent dealt a stick blow on him. That thereafter, the father was taken to the hospital whereas the informant went to the police station and filed FIR. Accordingly the offence was registered against the respondents. Thereafter, it was noticed that the deceased died on account of the injuries sustained by him in the aforesaid incident and, therefore, offence under section 302 of IPC was also registered against the respondent. The respondents were arrested, investigation was undertaken, statements of witnesses were recorded, discovery panchnama was prepared, post mortem note was obtained and medical certificates were also received from the Medical Officer.

At the end of the investigation, charge sheet was filed against the respondents for the aforesaid offences. Out of the aforesaid offences, offence punishable under section 302 of IPC was exclusively triable by a court of Sessions and, therefore, the case was committed to the court of Sessions. The Sessions Court ascertained that the police investigation papers were supplied to the respondents. Charge was prepared and framed against the respondents above named at Exh.1 and it was read over and explained to the respondents. They pleaded not guilty and, therefore, the evidence was recorded and at the conclusion of evidence, further statements of the respondents were recorded under section 313 of the Code. Arguments were heard and thereafter, the trial court found that the prosecution had failed to bring home the guilt to the accused and, therefore, the trial court pronounced its judgment acquitting the respondents.

3. Feeling aggrieved by the said judgment and acquittal order of the trial court, the State has preferred the present acquittal appeal before this Court. It has been mainly contended before this Court that there was sufficient evidence on record of the trial court in order to hold the present respondents guilty for the aforesaid offence, that the trial court has given wrong emphasis on the alleged contradictions between the oral evidence and the medical evidence. That the trial court has also not properly appreciated the fact that the injuries caused on the person of the accused were not required to be explained by the prosecution and non-explanation cannot render the evidence unreliable. That on the whole, the judgment and acquittal order recorded by the trial court are illegal and erroneous and deserve to be set aside. That therefore, the present appeal be allowed, the judgment and acquittal order of the trial court be set aside and the respondents be convicted for the aforesaid offences and they may be sentenced in accordance with law.

4. The appeal was admitted and in response to the service of notice of admission, Mr A D Shah, learned Advocate has appeared on behalf of all the three respondents. When the matter came up for final hearing, Mr B D Desai, learned APP appeared for the State and Mr A D Shah, learned Advocate appeared for the respondents. During the course of their lengthy arguments, they have taken us through oral and documentary evidence on record as well as to through the observations made by the learned trial Judge during the course of his judgment.

5. In order to prove the case against the

respondents, the prosecution has examined at least four eye witnesses. Out of them, PW 3, Kheranbibi Abbaskarim at Exh.27 is the informant and eye witness. Her evidence is followed by the evidence of Mohammad Hanif Abbas at Exh.33, Gulamnabi Abbasbhai at Exh.35 and Abdul Karim at Exh.36. These are the main witnesses through whom the prosecution has tried to prove their case against the respondents. It would, therefore, be necessary to consider the above evidence on record. Kheranbibi at Exh.27 has deposed before the trial court that in the morning there was a quarrel between her sons and the daughters of the first respondent at about 9 a.m. on the date on which the aforesaid incident took place i.e. on 15.2.1985.

6. The other witnesses have also supported the case of the informant on this aspect of the case. This aspect is more or less related to the existence of motive for the commission of the offence in question. Here it is required to be considered that the morning incident is said to have taken place between the sons of the informant and the daughters of the first informant. The father of the informant who is said to have been killed in the aforesaid incident at 8 p.m. was nowhere in the picture so far as the morning event is concerned. The respondent had no reason to kill the father of the informant for the alleged event between the sons of the informant and the daughters of the first respondent. The deceased father is not a resident of the same locality. On the other hand, the informant and the respondents have been staying in the same locality and their houses are situated just opposite to one another. Therefore, if the respondent wanted to commit any offence on account of the morning event, then it was very easy for them to stage quarrel with the informant or her family. It is more so, when even according to the evidence of the informant, she was sitting on her otta at about 8 p.m. and, therefore, during the course of the day or even at 8 p.m. the informant was easily available to the respondents for committing some offence. However, no offence was committed during the course of the entire day and, therefore, it has to be accepted that the morning event had no relation with the evening event. In other words, it cannot be said that the morning incident was the cause of action of the evening event. In other words, it has to be accepted that the motive as alleged by the prosecution right from the stage of filing of FIR has not been established to any extent. It may be observed that in criminal cases, motive may not be a cause in all cases. However, when the prosecution has come out with a case of motive, ordinarily, the prosecution is expected

to prove the fact of motive. In the present case, we find that in view of the above observations, the motive cannot be said to have been proved.

7. Then we can turn to evidence of witnesses. According to Kheranbibi at Exh.27, the incident took place at 8 p.m. near her house. She was sitting on the otta of her house. It is also her case that her father was coming from the opposite direction and on seeing the father coming from opposite direction, the first accused rushed to him and dealt dharia blow on his head. It is also her evidence that her brother Gulamnabi rushed to the spot to save her father and, therefore, the respondent-Zaheer Rahman inflicted spear blow on him; that respondent no.3 had dealt stick blows on the head of the deceased father.

8. On this aspect of the case, the prosecution has examined the other eye witnesses - Mohammed Hanif Abbas at exh.33, Gulamnabi Abbasbhai at Exh.35 and Abdulkareem Hameed at Exh.36. By and large these witnesses have tried to support the case of the informant at Exh.27. However, we find that the above evidence of the aforesaid four eye witnesses has not been corroborated by medical evidence. As said above, according to the evidence of the aforesaid witnesses, the deceased has sustained one injury by means of dharia and two other injuries by means of stick. This would show that there should be at least three injuries on the person of the deceased. If we refer to the evidence of Dr. Kamlesh Rathod at Exh.29 at page 60, we can find that the said Medical Officer had noticed three injuries on the person of the deceased which have been described in para 2 of his evidence as follows:

"2. I found the following external injuries on that dead-body:

(1) Stitched wound of about 3" in length on the fight frontal region.

(2) Diffused tender swelling on the frontal region.

(3) Ecoymosis on both upper eye-lids reddish blue in colour. The fracture of the right frontal bone was also found externally."

On perusal of the evidence of the Medical Officer, one may gather an impression that the evidence of the eye witnesses gets corroborated from the Medical Officer

since all the witnesses have referred to three injuries on the person of the deceased. Therefore, we may be required to turn to para 8 of the evidence of this Medical Officer wherein he has stated in unequivocal terms that the injuries no. 2 and 3 on the head of the deceased are due to the reflexes of injury no.1. This means that all the three injuries were noticed on account of a single blow. This would further mean that the deceased had received only one blow on his person. It, therefore, cannot be said that the deceased had received three blows on his head, one at the hands of the first respondent and two at the hands of third respondent. This would clearly show that the evidence of the eye witness on the point of number of blows inflicted on the deceased has been contradicted by medical evidence. No further explanation has been rendered by the prosecution to explain the said contradiction and, therefore, the unexplained contradictions has remained on record which would be one of the fatal material to the case of the prosecution.

9. Then, another aspect of the case is that the medical evidence proves that even the accused persons sustained injuries on their person. This can be gathered again from the said evidence of the Medical Officer at Exh.29. Dr. Kamlesh Rathod at exh.29, has clearly deposed in para 6 and 7 of his evidence that on 15.2.1985 at about 6 a.m. he had examined Mohmmed Hameed, respondent no.2 and found the following injuries on his person: I examined Mohmmed Hameed at 6 a.m. and found the following injuries:

(1) Diffused tender swelling on left elbow joint and upper 1/3rd of the left forearm.

(2) Diffused tender swelling on the left temporal region.

(3) Contusion mark of 3" x 2" on the back of the upper part of the left side of the chest, Reddish in colour.

X-ray of left elbow with upper 1/3 of the left fore arm shows fracture of the lateral condyle of the left humerus.

X-ray chest was NAD.

He was treated as indoor patient. I issued certificate, the copy of which is produced at

Exh.18.

7. On 16.2.85 at about 6.10 a.m. I examined Zahir Rahman and found the following injuries:

(1) CLW of 2 cms x 1 cm. x muscle deep, fresh with diffused tender swelling on the dorsum of right hand.

(2) Contusion marks of 5" x 1" and 3" x 1" on the back of the left side chest, oblique in position with 1/2" distance between them, reddish in colour.

(3) Contusion mark of 2" x 1/2", reddish on the back of the right shoulder - joint.

10. Dr. Kamlesh Rathod further deposed that X-ray photographs taken with respect to the above injuries. The Medical Officer has further deposed during the course of his evidence that fractures were noticed on the person of both the accused persons. So far as Mohammed Hammed is concerned, he had fracture on the left elbow and upper left forearm. So far as Zahir Rahman is concerned, he had fracture on 5th Metacarpal bone. The patient was treated as indoor patient in the said hospital. Oral evidence of the Medical Officer has been further supported by the injury certificates produced at Exhs. 18 and 19. The said evidence further shows that the injuries were fresh. It also shows that both the accused were treated within few hours of the time of the occurrence. It would, therefore, be clear that these two respondents had sustained injuries of fracture during the course of the incident in question. We have been taken through evidence of all the four eye witness at Exhs.27, 33, 35 and 36. Nowhere we could find any explanation rendered by any of the said witnesses in order to explain the injuries sustained by respondents no.1 and 2. Learned APP arguing the matter on behalf of the State had also to agree that the injuries sustained by the two accused persons have not been explained to any extent by the aforesaid four eye witnesses. It may be noted here that except the evidence of those four eye witnesses, there is no other eye witnesses to give evidence about the incident in question. Therefore, at no point of place, the prosecution has explained the injuries sustained by the two accused persons. It is required to be considered that these were not minor injuries. The Medical Officer has clearly deposed that there were

fractures on the person of the two respondents. Moreover, the injuries were on elbow and on the palm of the two respondents. Therefore, these injuries were visible without any difficulty. In that view of the matter, it was the duty of the prosecution to explain the said injuries. In the present case, it is found that those injuries have not been explained by the prosecution and, therefore, it would be necessary to refer to the latest pronouncement of the Hon'ble the Supreme Court. It may be noted here that even the trial court has considered this aspect of the case and on failure of the prosecution to explain the injuries on the persons of the accused persons, the trial court has observed that on the one hand the story of the eye witnesses would not be acceptable, on the other hand, it would probablise the case of the respondents regarding exercise of self-defence. The trial court has also observed that in view of the un-explained injuries on the persons of the respondents, the evidence of the prosecution witness cannot be accepted and it has to be observed that the witnesses have not been telling the truth.

11. The trial court has also referred so some decisions of the Hon'ble the Supreme Court on the point of unexplained injuries on the person of the accused during the course of the incident in question. We may also refer to some latest pronouncements of the Hon'ble the Supreme Court. One of such decisions is in the case of Subramani v. State of Tamil Nadu, reported in (2002) 7 SCC 210. There also injuries were sustained by some of the appellants and that had not been explained by the prosecution and on fact, the Hon'ble the supreme Court accepted the plea of exercise of right of private defence and it was further held that the appellants had not exceeded their right of private defence and it was further observed by the Supreme Court in the said decision that even if the injuries were simple, it would not relieve the prosecution of its obligation. On failure to explain the said injury, the court can draw inference that prosecution has not presented the true version of the occurrence. So on the one hand, it would be reasonable to view that the prosecution witnesses have not given full and true version of the incident, on the other hand, the case of exercise of right of private defence may be probablised by the absence of explanation with respect to the injuries on the person of the accused.

12. Another decision on this aspect can be gathered from the case of Sekar v. State, reported in (2002) 8 SCC 354. There also the Supreme Court has observed that

non-explanation of the injuries sustained by the accused at the time of occurrence or in the course of altercation, is very important circumstance. It has also been observed that mere non-explanation of the injuries by the prosecution may not affect the prosecution case where the injuries sustained by the accused are minor and superficial or where the evidence is so clear and cogent, so independent and disinterested, so probable, consistent and creditworthy, that it far outweighs the effect of the omission on the part of the prosecution to explain the injuries. The pertinent observations can be gathered from paras 6, 8 and 10 as follows:

> "A plea of right of private defence cannot be based on surmises and speculation. While considering whether the right of private defence is available to an accused, it is not relevant whether he may have a chance to inflict severe and mortal injury on the aggressor. In order to find whether right of private defence is available or not, the injuries received by the accused, the imminence of threat to his safety, the injuries caused by the accused and the circumstances whether the accused had time to have recourse to public authorities are all relevant factors to be considered whether in a particular set of circumstances, a person acted in the exercise of the right of private defence, is a question of fact to be determined on the facts and circumstances of each case. No test in the abstract for determining such a question can be laid down. In determining this question of fact, the court must consider all the surrounding circumstances. It is not necessary for the accused to plead in so many words that he acted in self-defence. If the circumstances show that the right of private defence was legitimately exercised, it is open to the court to consider such a plea. In a given case, the court can consider it even if the accused has not taken it, if the same is available to be considered from the material on record."

13. In the present case, we have to accept that the evidence produced on record is the evidence of four eye witnesses of the same family. The incident has taken place at 8 p.m. in a residential locality in a small village. The place of event is surrounded by other houses which can be gathered from the sketch of the scene of the offence prepared and produced by the concerned witness at Exh.26. This evidence make it clear that the

incident has taken place on a public road which is near the house of the informant and again just near the house of the respondents also. There are other residential houses including huts and other houses. It is not the case of the prosecution that no other independent witness was available at the time when the incident took place. In that view of the matter, on the one hand, related witnesses are the only witnesses in the case, on the other hand, serious injuries of fractures on the part of at least two persons have not explained by the prosecution. In fact, the prosecution has not been made any effort to explain the injuries. Consequently, the right of self-defence has been probablised and once it is found that there is probability of exercising of private defence and once it is found that the injuries have not been explained by the prosecution, the accused will be entitled to acquittal on the basis of the acceptance of their private defence. We may also observe that even if there is some doubt as to whether or not there was existence of right of private defence, then also it has to be accepted that even the benefit of the said reasonable doubt can also be extended to the respondents. Therefore, on this aspect of the case, the trial court was justified in acquitting the respondents by extending the benefit of the said reasonable of doubt with respect of existence of right of private defence.

14. Then we also find that the prosecution has tried to prove their case by bringing evidence of discovery panchnama under section 27 of the Evidence Act. For this purpose, it would be necessary for us to refer to the evidence of panch witnesses and panchnama. For this purpose we can refer to the evidence of Rasool Abdulkarim Chauhan at Exh.45. As per the prosecution case, the first accused had discovered the muddamal dharia from his house. However, this panch witness has deposed before the trial court that on 25.2.1985, he was called as panch by the police, that the accused were present at the police station and the PSI told that all were required to go inside the village for bringing the weapons. That thereafter, they were taken to the residence of the first respondent. That the first respondent produced the muddamal dharia from his residence. This is not a discovery panchnama as required under section 27 of the Indian Evidence Act. The first accused never disclosed in the beginning that he was ready and willing to discover the said weapon. Unless discovery precedes with a voluntary act or desire on the part of the accused to discover a weapon, the panchnama cannot be treated to be a discovery panchnama. It is required to be considered that this witness was not treated as hostile by the

prosecution and he was not cross-examined by the prosecution with the permission of the court below.

15. This witness has further stated that another respondent Zaheer Rahman had produced the spear from his residence which was also seized by the police under panchnama Exh.47. Again with respect to this discovery, the witness does not say that respondent Zaheer Rahman had shown his willingness to discover the said weapon. Therefore, again, this is not a panchnama under section 27 of the Evidence Act. In other words, panchnama, at Exh.46 and panchnama at Exh.47 are not the panchnamas, which can be treated to be discovery panchnamas within the meaning under section 27 of the Indian Evidence Act. Therefore, it would not be possible to give any weight to these two panchnamas and also the evidence of the said panch witnesses. The contents of panchnamas at Exh.46 and 47 have not been proved through the evidence of panch witnesses. It would not be possible to accept those panchnamas as discovery panchnamas.

16. We have gone through the judgment of the trial court with the assistance of the learned Advocates for the parties. On going through the said judgment, we find that the trial court has given cogent reasons for not accepting the case of the prosecution and for not relying upon the evidence of the prosecution and for not convicting the present respondents. The evidence of the witnesses has been discussed at full length by the trial court. The contradictions between the witness have also been discussed at length. The probability of right of private defence has been considered by the said court. The contradiction between the medical evidence and the eye witnesses has also been properly appreciated by the trial court. This would mean that the trial court has considered the pros and cons of the case on hand. We find that the trial court has committed no error in appreciation of the evidence produced by the prosecution before it. By and large, we agree with the reasoning of the trial court and the findings arrived at by the trial court on the basis of the said reasonings. Therefore, we agree with the reasonings and findings and the conclusion arrived at by the trial court. We find that there is no error committed by the trial court in appreciation of evidence before it and, therefore, there is absolutely no reason for disturbing the findings of fact recorded by the trial court. This is after all an acquittal appeal and, therefore, it is well settled that this court has to be slow in interfering with the judgment and acquittal order recorded by the trial court. The trial court had all opportunities to see the demeanor of the witnesses

when their evidence was being recorded before it. Consequently, the entire appeal is meritless and it is required to be dismissed. Accordingly this appeal of the State is ordered to be dismissed. The impugned judgment and acquittal order recorded by the trial court are confirmed. The records show that the present respondents have been enlarged on bail as bailable warrants appear to have been issued against them. Therefore, the bail bonds are ordered to be cancelled and the sureties stand discharged.

4.4.2003 [D P Buch, J.]
msp

[H H Mehta, J.]